SUPREME COURT, U. S.

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No. 1016

IN THE

Supreme Court of the United States

APRIL TERM, 1964

CERMAK CLUB, INCORPORATED

and

FROLIC'S INCORPORATED,

Petitioners,

vs.

ILLINOIS LIQUOR CONTROL COMMISSIONERS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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To The Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

The petitioners, Cermak Club, Incorporated, and Frolic's Incorporated, pray that a writ of certiorari be issued to the Supreme Court of the State of Illinois to review the order of the latter court affirming the judgment of the Circuit Court of Cook County, Illinois, wherein that court sustained the action of the Illinois Liquor Control Commissioners in revoking the liquor licenses of the petitioners.

CITATIONS TO OPINION BELOW

The opinion of the Supreme Court of Illinois is reported in 30 Ill. 2d 90, 195 N.E. 2d 178. It bears the entitlement of *Cermak Club, Inc., Appellant*, v. *Illinois Liquor Control Commission, Appellee*, and *Frolic's Incorporated, Appellant*, v. *Illinois Liquor Control Commission, Appellee*, Nos. 37858, 37859.

The petitioners, Cermak Club, Incorporated, and Frolic's Incorporated, prosecuted their appeal jointly from the Circuit Court of Cook County, Illinois, to the Supreme Court of Illinois.

The Circuit Court of Cook County, in denying relief to the petitioners from the order of revocation of the Illinois Liquor Control Commission, certified that there was a constitutional question involved.

JURISDICTION

Final judgment of the Supreme Court of Illinois was entered on January 20, 1964, when that court entered an order denying the petition for rehearing. Petition for certiorari is filed herein within ninety days of the order wherein petition for rehearing was denied.

Jurisdiction of this court is appropriate by virtue of the provisions of Section 1257 (3) of Title 28, U. S. C.

QUESTIONS PRESENTED

When the sale of liquor is lawful, all regulations provided therefor must be pursuant to a legitimate exercise of the State's police power which includes the respecting of constitutional guarantees.

Where a controlling fact or question material to the determination of both causes has been adjudicated, and the same fact or question is again at issue between the same parties or their privies, adjudication in the first cause will be conclusive in the later suit, irrespective of the question whether the cause of action is the same in both suits or not.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States.

STATEMENT

The petitioners herein were granted a license by the State of Illinois for the sale of liquor.

While engaged in the business permitted by the licenses, employees of the licensees were, on various dates, arrested for alleged violations of law upon the licensed premises.

It is the contention of petitioners that the aforementioned employees were brought before various judges, tried for the alleged violations of law and acquitted.

Thereafter, the State's Attorney of Cook County, Illinois, initiated proceedings before the Illinois Liquor Control Commission seeking orders revoking the liquor licenses of the petitioners and alleging as grounds therefor the same alleged violations of law for which employees of the petitioners had been tried and acquitted.

Written motions to dismiss the proceedings before the liquor commission were filed setting forth, in substance, that employees of licensees had been tried and acquitted of the same alleged offenses as were made the grounds for the request for revocation of the licenses of petitioners. No answer was filed by the State to the motions, nor was leave requested to file answers to the motions. The commission denied the motions; evidence was taken which, it is reiterated, was, in substance, the same evidence introduced against the employees of the licensees prior thereto: and at the conclusion of the hearing, the commission entered orders revoking the liquor licenses of petitioners.

Appeal to the Circuit Court of Cook County was taken pursuant to the provisions of the Administrative Review Act of Illinois. Relief prayed for was denied.

REASONS FOR THE ALLOWANCE OF THE WRIT

The basic theory of petitioners for the allowance of the writ is that which is encompassed in the doctrine of collateral estoppel. In a broader sense, it is sometimes referred to as *res judicata.*

Reference to this theory is set forth with unusual clarity in the case of *Commissioner of Internal Revenue* v. *Sunnen,* 333 U.S. 591. On page 597, this Honorable Court there said:

> "The general rule of *res judicata* applies to repetitous suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissable matter which might have been offered for that purpose.' *Cromwell* v. *County of Sac,* 94 U.S. 351, 352. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. See *Von Moschzisker, 'Res Judicata,'* 38 Yale L. J. 299; Restatement of the Law of Judgments, Sections 47, 48. But where the second action between the same parties is upon a different cause or demand, the principle of *res judicata* is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon the determination of which the finding or

verdict was rendered.' * * * *But matters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel.* (Emphasis added) In this sense, *res judicata* is usually and more accurately referred to as estoppel by judgment, or collateral estoppel. See Restatement of the Law of Judgments, Sections 68, 69, 70; Scott, 'Collateral Estoppel by Judgment,' 56 Harv. L. Rev. 1."

In *Emich Motors Corporation, et al. v. General Motors Corporation, et al.*, 340 U.S. 558, this Court said, on page 568, the following:

"The evidentiary use which may be made under Section 5 of the prior conviction of respondents is thus to be determined by reference to the general doctrine of estoppel. As this Court has observed, that 'principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction.' *Frank v. Mangum*, 237 U.S. 309, 334 (1915); *Sealfon v. United States*, 332 U.S. 575, 578 (1948). It is well established that a prior criminal conviction may work an estoppel in favor of the Government in a subsequent civil proceeding. *United States v. Greater New York Live Poultry Chamber of Commerce*, 53 F.2d 518 (S.D. N.Y. 1931), affirmed *sub nom. Local* 167 v. *United States*, 291 U.S. 293 (1934); *Farley v. Patterson*, 166 App. Div. 358, 152 N.Y. Supp. 59 (1915); see *State v. Adams*, 72 Vt. 253, 47 A. 779 (1900); 2 Freeman, Judgments (5th ed. 1925), Section 657. Such estoppel extends only to questions 'distinctly put in issue and directly determined' in the criminal prosecution. See *Frank v. Mangum, supra*, at 334; *United States v. Meyerson*, 24 F.2d 855, 856 (S.D. N.Y. 1928). In the case of a criminal conviction based on a jury verdict of guilty, issues which were essential to the verdict must be regarded as having been determined by the judgment. Cf. *Commonwealth v. Evans*, 101 Mass. 25 (1869)."

We should respectfully direct the attention of this Honorable Court to a portion of the opinion handed down by the Illinois Supreme Court. In that opinion, on page 93, the Illinois Supreme Court said the following:

> "We do not find it necessary, upon this record, to decide the question that the licensees seek to raise as to the validity of paragraph 5 of Rule 3. *For even if we assume that their position is correct, and that the Commission is bound by the two prior judgments of acquittal upon which they rely,* the propriety of the revocation and the correctness of the judgment of the circuit court in this case would not be affected." (emphasis added.)

The Illinois Supreme Court then went on to set forth that there were other instances of unlawful conduct that had not been previously litigated.

With profound respect for our state Supreme Court, we beg the indulgence of this Honorable Court to set forth portions from the trial record to indicate, that the Illinois Supreme Court has unwittingly misapprehended and overlooked evidence in the record which we feel points conclusively to the fact that all alleged illegal acts were previously litigated prior to the hearing before the commission. The following are excerpts from the record:

Michael J. Berry, who was a Chicago police officer, testified as follows (Rec. p. 62):

> Q. Did you testify before Judge Stefanowicz in the Criminal Court?
>
> A. Yes, I did.
>
> Q. In connection with the Frolics?
>
> A. Yes, I did.
>
> Q. That's the first time you ever testified under oath, isn't it?
>
> A. That's correct.

Q. About what you saw?

A. At the Frolics.

Q. And you told Judge Stefanowicz in substance what you've told the Commission here, isn't that right?

A. I did, I did. (Rec. p. 63)

The testimony of the witness Jack Love (Rec. p. 21) discloses the following:

Mr. Meyers: Q. Mr. Love, did you testify to what you saw there before any justice of the peace or police magistrate after the arrest? Did you appear before the justice of the peace or police magistrate?

The Witness: A. Yes.

Q. Where? In Bedford Park?

A. Yes, Bedford Park.

Q. Did you testify under oath there, in Bedford Park, to the things you've told the Commission here?

A. Yes. (Rec. p. 22)

Q. Frolic's case was tried before Judge Stefanowicz in the Criminal Court on an indictment? Rec. p. 34)

A. Yes, sir.

Q. And that was a not guilty verdict, wasn't it?

A. Yes.

The witness Horace B. Loomis testified as follows (Rec. P. 62):

Q. And you testified before Judge Stefanowicz in the Frolic's case?

A. Yes.

Q. About the things you say you saw there and the things you've told the Commission about?

A. Yes.

Q. And the judge found the people who were indicted not guilty, is that right?

A. Right.

Again, the witness Michael J. Berry gave testimony against the petitioner Cermak Club, Inc. (Magic Lounge) (Rec. P. 463):

Q. This is the first time you have given testimony under oath in connection with what you saw at the Magic Lounge (Cermak Club)?

A. No. I gave testimony in Bedford Park, on the first cause.

Q. What happened in Bedford Park? Did the judge hold them to grand jury, send them to jail, or dismiss them?

A. The judge dismissed them after making a statement that the police officers were telling the truth and apparently the other people were lying, but he still saw grounds to dismiss them.

Q. He found these people not guilty, is that right? He dismissed them?

A. Discharged, I believe he said.

Q. You testified there, did you?

A. Yes, did.

Q. To what you saw and what you told the Commission here?

A. That is correct.

Q. And the judge found them not guilty?

A. That's correct.

Q. And you told this judge what you have told the Commission?

(Rec. P. 464).

A. Yes.

Q. And the judge found these people not guilty, is that right?

A. Yes.

Q. Is that correct?

A. Yes.

The witness Loomis again testified with reference to the Cermak Club (Magic Lounge) (Rec. P. 504):

Q. Do you know whether there were any other dates mentioned in the complaint besides July 11, 1961?

A. Possibly July 10th, to the best of my knowledge.

Q. Other than that, were there any other dates?

A. Not that I can recall offhand, without looking at the complaints.

Q. To your knowledge, was there any testimony about any other dates besides July 10th and 11th?

A. I know there was other testimony out there in regard to—other than those two nights, yes.

If, then, all of the matters and things in connection with alleged violations of law were testified to by the various police officers before the various tribunals heretofore mentioned, and then said testimony was again used before the Commission, upon which the revocation orders were issued, we most respectfully urge that the doctrine of collateral estoppel is applicable.

If, then, the doctrine of collateral estoppel is applied, then all of the testimony heard before the Commission should have been barred by virtue of the doctrine. There then was no testimony whatever upon which the Commission could predicate its order of revocation.

As Mr. Justice Black of this Court, speaking for the entire Court, said in *Thompson* v. *City of Louisville, et al.*, 362 U.S. 199, 206: "Thus we find no evidence whatever in the record to support these convictions. Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt." In support of the above is *Garner, et al.* v. *Louisiana*, 368 U.S. 157.

To the same extent then would a revocation of a license without any evidence be a denial of due process.

We thought this Honorable Court would be interested in hearing from us with respect to an opinion often voiced by a school of thought which takes the position that "there is no constitutional right on the part of anyone to sell intoxicating liquor."

We anticipate that the respondent may make this argument in opposition to the granting of this writ. In connection with this, may we respectfully direct this Court's attention to the language set forth by the Louisiana Supreme Court in the case of *Schwegmann Bros.* v. *Louisiana Board of Alcoholic Beverage Control, Appt.*, 216 La. 148, 43 So2d 248. This opinion is important enough to be the subject matter of an annotation in 14 ALR2d 680. With accuracy and generosity, the Louisiana Supreme Court had the following to say on this proposition (p. 689) of 14 ALR2d:

> "Our appreciation of the law is that even though a state has the authority to grant or deny a privilege to conditions, which a person is free to accept or reject, its power in that respect is not unlimited. It may not through an abuse of its police power impose conditions which require the relinquishment of constitutional rights. And this limitation applies to the liquor traffic, notwithstanding that the state has the right to suppress it entirely or may, in curbing the attendant evils, impose regulations on it more stringent than on other businesses. *When the liquor traffic is lawful, as it now is, all regulations provided therefor must be pursuant to a legitimate exercise of the state's police power, which includes the respecting of constitutional guaranties.* (emphasis added.) Supporting this view is *State ex rel. Galle* v. *City of New Orleans*, 113 La. 371, 36 So. 999, 1002, 67 LRA 70, 2 Ann. Cas. 92, in which this court said:

'It is wholly immaterial, for the purposes of the question presented, that it has been held that the right to sell intoxicating liquors is not inherent in a citizen of a state or of the United States (*Crowley* v. *Christensen*, 137 US 86, 11 S. Ct. 13, 34 L. ed. 620), and equally immaterial that in another state it has been held that such right is derived from the common law (*Welsh* v. *Indiana* [126 Ind. 71], 25 NE 883, LRA [664], 666), since in Louisiana it is a right conferred by the written law of the state, the enjoyment of which is subject to such conditions only as may be imposed or authorized by the General Assembly in the legitimate exercise of the police power of the state.

'The police power of the state can, however, be exercised only in the enactment and enforcement of laws, and the lawmaking power is restricted within the limitations imposed by the Constitution of the United States and its own Constitution, and those which are said to be inherent in American institutions, and, like other governmental authority, is to be used for the common welfare—impartially and without arbitrary or unjust discrimination to the prejudice of private rights and individual liberty. . . .

". . . A statute of this state imposing conditions upon the business of selling intoxicating liquors, though such conditions be more onerous than those imposed upon another business, may be sustained because the business of selling intoxicating liquors more seriously affects the health, morals, and general welfare of the public than another business; *but where, as in this case, the state legalizes the business of selling liquors, and an individual citizen is denied the right to engage in it in a place and under conditions where and under which*

others having no better qualifications than he are so engaged, the law, if any there be, authorizing such denial, has no just foundation in reason or in the police power of the state, for it deprives one citizen of the right to earn his livelihood by means of a lawful calling, whilst according that right to others similarly situated, and, in so doing, deprives him of the equal protection of the law, and of his liberty, without due process of law, and oversteps those restrictions upon legislation which are said to be inherent in the nature of American institutions." (emphasis added.)

We respectfully submit that where a license is granted to a corporate entity, alleged violations of law can only be committed by employees of the licensee, and where said employees has been acquitted, this then should form the basis of the application of the theory of collateral estoppel for the benefit of the corporate licensee.

CONCLUSION.

For the foregoing reasons, we respectfully urge that this petition for certiorari be granted.

Respectfully submitted,

MORRIS GORDON MEYERS,
Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served the foregoing petition for certiorari by mailing three copies thereof to the Attorney General of the State of Illinois, and three copies thereof to the State's Attorney of Cook County, Illinois.

.....

MORRIS GORDON MEYERS

APPENDIX A.

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

United States Constitution

Amendment Fourteen

Section 1:

"... nor shall any State deprive any person of Life, liberty or property without due process of law; nor deny to any person within its jurisidction the equal protection of the laws."

ADDITIONAL APPENDIX

OPINION

"Opinion of the Supreme Court of Illinois"
Docket Nos. 37858, 37859 Cons.—Agenda 56—
September, 1963.

Cermak Club, Inc., Appellant, v. *Illinois Liquor Control Commission, Appellee.*—(*Frolic's, Inc., Appellant,* v. *Same Appellee.*)

Mr. JUSTICE SCHAEFER delivered the opinion of the court:

The Illinois Liquor Control Commission revoked the liquor licenses of Cermak Club, Inc., and Frolic's, Inc., upon findings that each of the licensees had permitted "lewd dances in the nude" in its licensed premises on 13 specified dates in 1961 and 1962, and had also permitted solicitation for prostitution in its licensed premises on six of those dates. The licensees instituted administrative review proceedings in the circuit court of Cook County in which they

prayed that the order revoking their licenses be reversed. The circuit court denied the relief prayed, and the licensees have appealed directed to this court. The cases have been consolidated.

The licensees do not question the sufficiency of the evidence heard by the Commission to support its findings, nor do they question that those findings establish violations of law which justify revocation. They were charged before the Commission with violation of Rule 3 of the Commission, and both in the trial court and in this court they have challenged the constitutionality of that Rule.

Paragraph 1 of Rule 3 provides that no licensee shall "in the conduct of the licensed business or upon the licensed premises" violate or permit the violation of "any law of the State of Illinois;" or of any municipal "or county ordinance or resolution regulating the sale of alcoholic liquors." Paragraph 2 provides for revocation or suspension of a license for violation of the rule. Paragraph 3 of the rule provides that a violation "may be proved by evidence that the licensee has been convicted of a violation of the law of the State of Illinois in the conduct of the licensed business or upon the licensed premises," or has been found guilty of violating any municipal or county ordinance or resolution regulating the sale of alcoholic liquors. Paragraph 4 of the rule provides that evidence that any person other than the licensee has been convicted of violating a statute, or an ordinance or resolution regulating the sale of alcoholic liquors, while upon the licensed premises, "shall be *prima facie* evidence of violation of this rule." Paragraph 5 is as follows: "Proof before this Commission of facts which establish a violation of any State statute, city, village, town or county ordinance or resolution or rule of this Commission, shall be sufficient

cause for revocation or suspension of any license by the Commission, irrespective of whether or not a conviction has been obtained in any Court."

The initial attack upon the validity of Rule 3 is that it violates article III of the constitution of Illinois in that it commits to the Commission the determination of "what acts or facts constitute a violation of law" which is said to be an exercise of judicial power. But article III of the constitution has not been interpreted so rigidly as to preclude the possibility of administrative adjudication. This court has held that "An administrative officer empowered to issue and revoke licenses to engage in a business or profession necessarily exercises quasi-judicial powers in determining whether a license should be issued or revoked, but such exercise of power is incidental to the duty of administering the law and does not constitute the exercise of judicial power within the prohibition of the constitution." *Department of Finance* v. *Gandolfi*, 375 Ill. 237, 240.

The basic grievance of the licensees appears to be that on two of the 13 dates specified in the findings of the Commission, their employees had been arrested and "charged with violations of law substantially as set forth" in the revocation proceedings. On both of these occasions the employees were found not guilty. On this ground the licensees argue that revocation of their licenses was barred by collateral estoppel. And because they interpret paragraph 5 of Rule 3 as requiring the Commission to disregard a prior judgment of acquittal, they assert the invalidity of that paragraph of the rule.

We do not find it necessary, upon this record, to decide the question that the licensees seek to raise as to the validity of paragraph 5 of Rule 3. For even if we assume that their position is correct, and that the Commission is

bound by the two prior judgments of acquittal upon which they rely, the propriety of the revocation and the correctness of the judgment of the circuit court in this case would not be affected. As to each licensee, the Commission's findings on 11 of the 13 allegations of lewd conduct on the licensed premises, as well as its findings of solicitation for prostitution on six occasions, would remain unchallenged. And those unchallenged findings are adequate to sustain the orders of revocation.

The judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

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ILLINOIS LIQUOR CONTROL COMMISSIONERS,
Respondents.

(Petition for writ of *certiorari* to the Supreme Court of Illinois.)

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

THE QUESTION PRESENTED.

Did the Illinois Supreme Court deny petitioners due process of law when they denied petitioners' contentions that previous acquittals in criminal trials were *res judicata* in a subsequent civil liquor license revocation proceeding

where the denial rested on grounds that the record did not establish that there had been an acquittal on every date a violation had been found to exist by the Illinois Liquor Control Commission?

STATEMENT OF FACTS.

A fuller exposition of the facts is found in the opinion of the Illinois Supreme Court in this case, (30 Ill. 2d 90, at pp. 91-92):

> "The Illinois Liquor Control Commission revoked the liquor licenses of Cermak Club, Inc., and Frolic's, Inc., upon findings that each of the licensees had permitted 'lewd dances in the nude' in its licensed premises on 13 specified dates in 1961 and 1962, and had also permitted solicitation for prostitution in its licensed premises on six of those dates. The licensees instituted administrative review proceedings in the circuit court of Cook County in which they prayed that the order revoking their licenses be reversed. The circuit court denied the relief prayed, and the licensees have appealed directed to this court. The cases have been consolidated."

REASONS FOR DENYING THE WRIT

Petitioners contend that if the Supreme Court of Illinois had applied the doctrine of *res judicata* in the manner they urge there would have been no evidence on which the petitioners could be found to have violated the Illinois Liquor Control Law. It is further argued that to revoke petitioners' licenses where there is no evidence in the record to support the revocation violates due process of law under th Fourteenth Amendment.

Without here reaching the issue of whether the doctrine of *Garner* v. *Louisiana*, 368 U. S. 157 and *Thompson* v. *City of Louisville*, 362 U. S. 199, applies to a civil liquor license

revocation, it is clear that if the doctrine of *res judicata* is not applied in the manner urged by petitioners, there was more than sufficient evidence to support the revocation.

Thus the petitioners' sole argument is that the doctrine of *res judicata* was improperly applied by the Illinois Supreme Court. This contention raises no question under the Constitution or statutes of the United States.

Furthermore, the doctrine was properly applied by the Illinois Supreme Court. With regard to this issue, the Illinois Supreme Court said at 30 Ill. 90, 93:

> "The basic grievance of the licensees appears to be that on two of the 13 dates specified in the findings of the Commission, their employees had been arrested and 'charged with violations of law substantially as set forth' in the revocation proceedings. On both of these occasions the employees were found not guilty. On this ground the licensees argue that revocation of their licenses was barred by collateral estoppel. And because they interpret paragraph 5 of Rule 3 as requiring the Commission to disregard a prior judgment of acquittal, they assert the invalidity of that paragraph of the rule.
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> We do not find it necessary, upon this record, to decide the question that the licensees seek to raise as to the validity of paragraph 5 of Rule 3. For even if we assume that their position is correct, and that the Commission is bound by the two prior judgments of acquittal upon which they rely, the propriety of the revocation and the correctness of the judgment of the circuit court in this case would not be affected. As to each licensee, the Commission's findings on 11 of the 13 allegations of lewd conduct on the licensed premises, as well as its findings of solicitation for prostitution on six occasions, would remain unchallenged. And those unchallenged findings are adequate to sustain the orders of revocation."

The testimony cited by petitioners on pages 7 through 10 of their petition in no way shows this conclusion to be erroneous. However, it should be noted that this testimony was not properly before the Illinois Supreme Court because petitioners failed to include it in their abstract, as required by the rules of that court.

Finally, even if the court had found that defendants were tried and acquitted on every occasion the Illinois Liquor Control Commission relied upon for the revocation of their licenses, the order was still correct. This court has already announced the rule that an acquittal in a criminal action is not *res judicata* in a subsequent criminal action on the same grounds. *United States* v. *National Association of Real Estate Boards*, 339 U. S. 486 and *Helvering* v. *Mitchell*, 303 U. S. 391.

Conclusion.

For the reasons urged herein, respondents respectfully request that the petition for *certiorari* be denied.

Respectfully submitted,

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Assistant Attorneys General,
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